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HAROLD B. WILLEY, C

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. 578

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, Debtor; and MISSOURI-ILLINOIS RAILROAD COMPANY, a Corporation,
Petitioners,

vs.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Petitioners, Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, and Missouri-Illinois Railroad Company, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on December 23, 1954.

OPINIONS BELOW.

The opinion of the District Court (R. 152-154) is reported in 117 F. Supp. 57. The opinion of the Court of Appeals, printed in Appendix B hereto, is reported in ..... F. 2d .....

JURISDICTION.

The judgment of the Court of Appeals was entered on December 23, 1954. No petition for rehearing was filed. Mandate of the Court of Appeals was, upon motion of appellants, stayed for a period of 30 days after January 13, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. A., Section 1254 (1).

QUESTIONS PRESENTED.

1. Absent diversity of citizenship of the parties, does a dispute between rail carriers concerning solely the interpretation of the break point provision of a revenue divisional agreement covering interstate traffic, which agreement was entered into voluntarily, and not pursuant to an order of the Interstate Commerce Commission, present a federal question?

2. If jurisdiction of the federal court is conferred by the Interstate Commerce Act, 49 U. S. C. A., Sec. 1 et seq., does Section 16 (3) (a) and (e) thereof, which fixes the time beyond which no court could have jurisdiction, apply in a suit arising from a dispute between carriers respecting division of revenues?

3. If said dispute presents a federal question and the courts have not been deprived of jurisdiction, does a proper interpretation of Item 66-B, paragraph (b) of said

agreement require the primary break of said divisions to be made on the St. Louis, Mo.-East St. Louis, Ill., gateway, or on the Flinton, Ill., gateway?

STATUTES INVOLVED.

The statutory provisions involved are Sections 1 (4), 6 (1), 8, 9, 16 (3) (a) and (e) of the Interstate Commerce Act, 49 U. S. C. A., Sections 1 (4), 6 (1), 8, 9, 16 (3) (a) and (e); and are printed in Appendix A hereto.

STATEMENT.

St. Louis-San Francisco Railway Company filed a complaint against Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, and Missouri-Illinois Railroad Company, in the District Court of the United States for the Eastern District of Missouri on January 29, 1952, to recover $361,078.05 together with interest at 6% per annum from August 25, 1947, which it claimed as an additional amount due it as its division of the joint revenue collected on 7,131 tank carloads of crude oil shipped from Greig, Oklahoma, to Selmaville, Illinois, during the period June 1, 1944, to October 31, 1945 (R. 1-5). The suit arose out of a dispute between the parties over the interpretation and application of their divisional agreement. There is no diversity of citizenship of the parties (R. 2). Plaintiff, Frisco, by amendment to its complaint alleges that its action arises under the Interstate Commerce Act, 49 U. S. C. A., Section 1 et seq. (R. 17), and which the defendants in their answer thereto denied (R. 18).

All the essential facts are covered by stipulations of the parties, except the interpretation of Item 66-B of Supplement 52 to Southwestern Lines' Division Sheet No. 100, which presents the controlling issue insofar as the merits of the cases are concerned (R. 63, 71-87, 120, 121, 134-141). The other questions pertain solely to the jurisdiction of the federal courts.

The majority of the court below affirmed the District Court's interpretation of Item 66-B, holding that St. Louis, Mo.-East St. Louis, Ill., and not Flinton, Ill., is the inter-territorial divisional gateway on the traffic involved by concluding ". . . that each of the [District Court's] findings, 15, 16 and 17, is supported by substantial evidence and none is clearly erroneous" (App. B., p. 8).

Judge Sanborn, dissenting, said: "I am, however, of the opinion that there was an inadequate basis for determining that the Missouri-Illinois Railroad Company's division of the joint revenue on the traffic in suit was unlawful. The judgment appealed from should, I think for that reason only, be reversed" (App. B., p. 16).

The court below unanimously affirms the holding of the trial court that "jurisdiction of this court is conferred by the Interstate Commerce Act, 49 U. S. C. A., Section 1, et seq" (R. 159; App. B., p. 9), but seemingly are not in entire agreement with respect to the interpretation and application of Section 16 (3) (a) and (e) of the Interstate Commerce Act, 49 U. S. C. A., Section 16 (3) (a) and (e) (App. B., p. 14), which read:

> 16 (3) (a) "All actions at law by carriers subject to this part for recovery of their charges, or any part thereof, shall be begun within two years from the time the cause of action accrues, and not after."
>
> 16 (3) (e) "The cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after."

Petitioners contended that the lapse of time before the commencement of the action not only barred the remedy, but extinguished the right, and therefore went to the jurisdiction of the courts. Their reliance is upon **Midstate**

Horticultural Co. v. Pennsylvania Railroad Company (1943), 320 U. S. 356, 364.

The court below relies upon **Atlantic Coast L. R. Co. v. Baltimore & Ohio R. Co.** (1935, D. C. Md.), 12 F. Supp. 711, by stating (App. B., p. 13):

> "But the precise question was considered by the court in **Atlantic Coast L. R. Co. v. Baltimore & Ohio R. Co.**, 12 F. Supp. 711 (loc. cit. 718-719), and we are in accord with the court's declaration in that case that 'these provisions [49 U. S. C. A., section 16 (3) (a-c)[1]] seem to contemplate actions or complaints between carriers and shippers, and not between carriers only. (a) and (c)[1] also seem clearly inapplicable because the complaint here is not for the recovery of "charges" or "overcharges."' That decision appears to have been accepted by the railroads since its promulgation in 1935 without any protest that we know of by the Interstate Commerce Commission which is primarily charged with the railroad regulation involved in divisions from interterritorial hauls. And we adhere to it."

Judge Johnsen went along with the court's opinion relative to the construction made of 49 U. S. C. A., Section 16 (3) (a) and (e) for the sake of unanimity, but stated in his concurring opinion (App. B., p. 14):

> "The only portion of the opinion that has bothered me somewhat is the construction made of 49 U. S. C. A., § 16 (3) (a) and (c),[1] through the adoption of Judge Chestnut's language in **Atlantic Coast Line R. Co. v. Baltimore & O. R. Co.**, D. C. Md., 12 F. Supp. 711, 718, that 'These provisions seem to contemplate actions or complaints between carriers and shippers, and not

[1] Section 16 (3) (e) is erroneously referred to as Section 16 (3) (c) throughout Court of Appeals opinion.

between carriers only.' I can see no reason on the statute to believe that, when Congress deemed it advisable, in the interest of uniformity and certainty, to impose a limitation on 'All actions at law by carriers . . . for recovery of their charges, or any part thereof,' it was in any way concerned about or intending to have regard for any theories, forms, technicalities and distinctions in common law actions or recoveries. I think it was fixing a time, as a general transportation-code policy, within which a carrier had to act to recover its transportation charges or revenues against anyone who owed it the duty of making payment thereof as such. And certainly what is here being recovered is in fact transportation charges or revenues.

"Both of my colleagues, however, feel that Judge Chestnut's construction of the statute has probably had such acceptance and reliance in the railroad world as to be entitled to stand on the basis of stare decisis. I am without any enlightment or data in the situation on this score, either from the briefs or otherwise, but I shall, for the sake of unanimity, go along and accept my colleagues' respected view on the point."

Do the provisions of 49 U. S. C. A., Section 16 (3) (a) and (e) contemplate actions between carriers as well as between carriers and shippers? The Court of Appeals adheres to a district court opinion holding that "these provisions . . . **seem** to contemplate actions or complaints between carriers and shippers, and not between carriers only . . .," (emphasis supplied) but with some misgiving on the part of one member. Can jurisdiction be conferred upon the federal courts by the asserted railroads' acceptance of and the Interstate Commerce Commission's failure to protest a federal district court's opinion of doubtful import?

REASONS FOR GRANTING THE WRIT.

1. No Federal Question Is Presented.

All the essential facts except the interpretation of Item 66-B of Supplement 52 to Southwestern Lines' Division Sheet 100 are covered by stipulations between the parties (R. 71-87, 120, 121, 134-141). It is stipulated that there is no diversity of citizenship between the parties (R. 79); nor is there any question pertaining to facilities, services, routes, rates or reasonable divisions (R. 79-86). The divisional arrangement is by voluntary agreement of the parties and not under the compulsion of any order by the Interstate Commerce Commission (R. 81-84, 123, 124). The crux of this complaint is the interpretation of a provision of such voluntary agreement, namely, Item 66-B of Supplement 52 to Southwestern Lines' Division Sheet 100 (R. 124-127, 129, 130). That item embodies the conditions under which the Missouri-Illinois Railroad Company was willing to become a party to Southwestern Lines' Division Sheet 100, and upon which conditions it did, by agreement of the parties thereto, become a party to said division sheet (R. 130, 144, 145). Item 66-B, Paragraphs (b) (2) and (b) (3) are admitted by the respondent to be exceptions to the general principles of the division sheet and the item has "Special application to and from points on the Missouri-Illinois Railroad" (R. 125-127).

The Interstate Commerce Commission holds that the existence or nonexistence of divisions is not a tariff matter. **Acme Mills v. Director General,** as agent (1923), 81 I. C. C. 492, 494; **Chase & Co. v. N. Y. Central R. Co.** (1930), 161 I. C. C. 614, 616. "A division sheet is a publication in the form of a tariff which is circulated among connecting carriers to guide their auditors in the distribution of revenues arising from interline traffic. Generally speaking,

division sheets are not on public file. **Cornell Law Quarterly** (Vol. 39, N. 2, p. 213). The construction of an interstate tariff is not therefore involved and no federal question is presented on that ground. **Great Northern Ry. Co. v. Merchants Elevator Co.** (1922), 259 U. S. 286, 290. Nor is the fact that the carrier is under the Interstate Commerce Act sufficient, in and of itself, to confer jurisdiction. **Kansas City, Kan., et al. v. Atchison, T. & S. F. Ry. Co.** (1951), 101 F. Supp. 1, 5. In fact, respondent's contentions clearly and bluntly establish that the real basis of its suit is a breach of contract.

The parties to this suit have voluntarily agreed upon divisions of the joint revenue involved (R. 81-84, 143). The only question on the merits is whether the divisions break primarily over the St. Louis, Mo.-East St. Louis, Ill., gateway, or over the Flinton, Ill., gateway. That involves the construction only of Item 66-B, paragraph (b), supra (R. 129). The construction of Item 66-B, paragraph (b), supra, does not require or involve the construction of any federal law. There is no necessary connection between the enforcement of such a contract according to its terms and the existence of a controversy arising under federal law. Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit. **California Oil & Gas etc. Co. v. Miller** (1899), 96 Fed. 12; **McGoon v. Northern Pac. Ry.** (1913), 204 Fed. 998, 1005; **Shulthis v. McDougal** (1912), 225 U. S. 561, 569; **Gully v. First Nat'l Bank** (1936), 299 U. S. 109, 112-114; **Consolidated Freightways, Inc., v. United Truck Lines, Inc.** (1954), 216 F. (2d) 543.

2. If the Action Arises Under the Interstate Commerce Act, 49 U. S. C. A., Section 1 et seq., the Remedy Is Barred and the Right Extinguished.

The Court of Appeals construes Section 1 (4) of the Interstate Commerce Act (App. B, p. 9), which requires common carriers by railroad to establish through routes, and in case of joint rates, fares, or charges, to establish just, reasonable and equitable divisions thereof, to embrace, with respect to "divisions," the maintenance thereof; whereas, with respect to "rates, fares, or charges," the maintenance thereof is covered by a separate section, i. e., Section 6 (1), 49 U. S. C. A., Section 6 (1) (App. A, p. 1). Thus it appears that the Court of Appeals has placed an interpretation upon Section 1 (4) which is broader than Congress intended. This construction, however, supports the contention of respondent that the federal courts have jurisdiction to determine if the carriers have maintained their voluntary agreement. It is on that theory that the Court of Appeals concludes the cause of action arises under the Interstate Commerce Act (App. B, pp. 9, 10). It cites **Alton Railroad Co. v. United States** (1932), 287 U. S. 229, as authority, but which, when scrutinized, is no such authority. The suit in that case was filed under the Urgent Deficiencies Act of October 22, 1913, Chap. 32, 38 Stat. 208, 220, to enjoin part of an order of the Interstate Commerce Commission.

The Court of Appeals having thus concluded that the cause of action herein arises under the Interstate Commerce Act by broadening the provisions of Section 1 (4) to require common carriers by railroad to **maintain** as well as **establish** divisions, it narrows the application of Section 16 (3) (a) and (e) of the Interstate Commerce Act to make it nonapplicable to the instant case by following the court's declaration in **Atlantic Coast L. R. Co. v. Baltimore & Ohio R. Co.** (1935), 12 F. Supp. 711, 718-719, that

"these provisions [49 U. S. C. A., Section 16 (3) (a-c)[1]] seem to contemplate actions or complaints between carriers and shippers, and not between carriers only" (App. B, p. 13). The federal court, in that case, had jurisdiction on the ground of diversity and its construction of Section 16 (3) (a) and (e) was from the limitation standpoint only. Here, the question involved is one of jurisdiction and not of limitation. The Court of Appeals in that connection further states: "That decision appears to have been accepted by the railroads since its promulgation in 1935 without any protest that we know of by the Interstate Commerce Commission which is primarily charged with the railroad regulation involved in divisions from interterritorial hauls. And we adhere to it" (App. B, p. 13). The Court of Appeals seems to hold therefore that jurisdiction may be conferred upon the federal courts by the asserted railroads' acceptance and the Interstate Commerce Commission's failure to protest a district court decision in which the question of jurisdiction was not even an issue.

The test of whether this action arises under the Interstate Commerce Act as alleged is whether it is subject to Section 16 (3) (a) and (e). This court held in **Midstate Horticultural Co. v. Pennsylvania R. Co.** (1943), 320 U. S. 356, 361, that Section 16 is an integral part of the Interstate Commerce Act and the comprehensive scheme of regulation it imposes. It also held (l. c. 357-360) that the expiration of the time limit fixed by Section 16 (3) (a) of the Act for the bringing of actions by carriers for the recovery of their charges **does not merely bar the remedy but extinguishes the right.** It is jurisdictional. The shipments involved herein moved during the period June 1, 1944, to October 31, 1945 (R. 80). Suit was filed by the Frisco January 29, 1952 (R. 1).

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[1] Section 16 (3) (e) is erroneously referred to as Section 16 (3) (c) throughout Court of Appeals opinion.

The Court of Appeals' treatment of "exceptions" is both unique and inconsistent. In interpreting Item 66-B, paragraph (b) (2) of Supplement 52 to Southwestern Lines' Division Sheet 100, which is an admitted exception to the general provisions of the division sheet (R. 125-127), it reads it out of the agreement and therefore devitalizes it, but in interpreting Section 16 (3) (a) which contains no exception, it reads one into the section by holding in effect that "**All** actions at law by carriers . . ." does not contemplate actions between carriers (App. B, pp. 12, 13). (Emphasis added.)

We know of no case involving a dispute between carriers over their divisions where the federal courts, in the absence of diversity or an order by the Interstate Commerce Commission, have assumed jurisdiction. The Court of Appeals has decided this question relying upon a district court decision in 1935 which is of extremely doubtful authority with respect to jurisdiction. This presents an important federal question which has not heretofore been passed upon by this court, but should be settled by it.

3. Primary Divisions Break Over the Flinton, Illinois, Gateway.

It is admitted that Item 66-B of Supplement 52 to Southwestern Lines Division Sheet 100 is an **exception** to the general provisions of said division sheet (R. 125-127). Item 66-B embodies the conditions under which the Missouri-Illinois was willing, at the invitations of carriers already a party to Southwestern Lines' Division Sheet 100, to become a party thereto. The majority of the Court of Appeals construes Item 66-B to be meaningless—negativing the admission by respondent that the item is an exception to the general provisions of the division sheet—and the effect of which would be no different than if the Missouri-Illinois had become a party to the division sheet

subject to no conditions whatever (R. 151). Judge Sanborn, in dissenting, said:

> "It seems to me that the record shows that the Missouri-Illinois Railroad Company became a party to the Division Sheet in suit upon the understanding, adequately expressed, that revenues derived from traffic from the Southwest destined for points on its line and received at either Kellogg or Flinton should be divided 22% to it and 78% to the carrier or carriers which transported the shipments to either of those gateways . . ." (App. B., p. 15).
>
> ". . . I am, . . ., of the opinion that there was an inadequate basis for determining that the Missouri-Illinois Railroad Company's division of the joint revenue on the traffic in suit was unlawful. The judgment appealed from should, I think for that reason only, be reversed" (App. B., p. 16).

Southwestern Lines' Division Sheet 100 was originally issued effective December 1, 1929 (R. 21). The Missouri-Illinois was invited to become and did become a party thereto effective with October, 1942, Accounts (R. 31, 33). Prior to the Missouri-Illinois becoming a party to said division sheet, the gateways named therein and over which the divisions broke were: Kansas City and St. Louis, Missouri, and East St. Louis, Cairo, Gale and Thebes, Illinois (R. 21, 76, 83). The Missouri-Illinois does not serve any of those gateways. So, upon becoming a party to the division sheet, Kellogg and Flinton, Illinois, the only two gateways served by the Missouri-Illinois Railroad were added as gateways (R. 31, 76, 83). The traffic in question moved from Greig, Oklahoma, a point in the Southwest, to Selmaville, Illinois, a point in Illinois on the Missouri-Illinois Railroad (R. 72, 141). It was routed via the Frisco from Greig, Oklahoma, to St. Louis, Missouri, thence via the Missouri Pacific to Flinton, Illinois, thence via the Missouri-Illinois to Selmaville, Illinois, and so moved (R. 121).

The title page of Supplement 52 to Southwestern Lines' Division Sheet 100 shows percentages accruing to and from Flinton and Kellogg, Illinois, "as provided in Items Nos. 18, 66 and 67 series" (R. 61).

Item 18 series provides for divisions between stations in Western Trunk Line-Illinois Freight Association territory and stations in Southwestern territory where the Missouri-Illinois participates as an **intermediate carrier** (R. 67, 143-147).

Item 66 series provides for divisions between (a) Missouri-Illinois stations in Missouri and Illinois Freight Association-Western Trunk Line territory; and (b) Missouri-Illinois stations in Illinois and the Southwest (R. 69, 144-147).

Item 67 series provides for divisions to and from points on St. Francois County Railroad Company which connects with the Missouri-Illinois at DeLassus, Mo. (R. 69, 145-147).

Each of those item series, Nos. 18, 66 and 67, contains a provision stating "Percentages via Kellogg, Ill., will also apply via Flinton, Ill." or "Factors to and from Kellogg, Ill., will also apply to and from Flinton, Ill." [See note, Item 18-G, R. 67, and Item 66-C, paragraph (a) (2) and paragraph (b) (2); and Item 67-A, paragraph (3), R. 69.]

Item 18 series also carries a specific "exception" as follows:

> "On traffic interchanged at E. St. Louis, Ill., or St. Louis, Mo., the divisions shown in Division Sheet, as amended, via those gateways will apply" (R. 67).

Item 67 series, paragraph (2), carries a similar specific exception as follows:

"Divisions via Kellogg, Ill., will not apply on traffic interchanged at East St. Louis, Ill., or St. Louis, Mo." (R. 69).

Item 66 series, paragraph (a) (3), which has no application to the traffic in question, also carries a similar specific exception as follows:

"Divisions via Kellogg, Ill., will not apply on traffic interchanged at East St. Louis, Ill., or St. Louis, Mo." (R. 69).

But, Item 66 series, paragraph (b), which covers the traffic in question—traffic between Missouri-Illinois stations in Illinois and the Southwest—contains no such specific exception (R. 69).

The intent of the parties is thus made crystal clear. If they had intended that the divisions on traffic between the Southwest and Illinois stations on the Missouri-Illinois should break on St. Louis, Mo.-East St. Louis, Ill., to the exclusion of Flinton, Ill., when traffic is interchanged at both of said gateways, they would have specifically so provided in Item 66 series, paragraph (b) as they did in Item series Nos. 18 and 67, and even in Item 66-series, paragraph (a). The absence of such a specific exception in Item 66-series, paragraph (b), clearly indicates an intent that the divisions of the revenue on the traffic in that category would divide over Flinton.

Since Item 66-series is admitted by respondent to be an exception to the general provisions of the division sheet, the construction of the contract by the Court of Appeals which renders meaningless the exception expressed therein should be avoided. **Andrew Jergens Co. v. Woodbury, Inc. (1921), 273 F. 952, 959, affirmed 3 Cir. 279 Fed. 1016, Certiorari denied 260 U. S. 728, 43 S. Ct. 92; 17 Corpus Juris Secundum, Contracts, Section 343.**

Further evidence of the intent that the involved divisions should break on Flinton, is the fact that the Kellogg and Flinton gateways, the only two gateways served by the Missouri-Illinois Railroad, were added when the Missouri-Illinois became a party to the division sheet (R. 83, 84). There are several routes between Greig, Oklahoma, and Selmaville, Illinois, in which the Missouri-Illinois Railroad participates via one or the other of those gateways and at which the traffic must be interchanged. One route is via the Frisco from Greig, Oklahoma, to Ste. Genevieve, Missouri, thence Missouri-Illinois to Selmaville, Illinois (R. 89, 149, 150). Kellogg is indisputably the divisional gateway over that route and the joint revenue would divide 22% to the Missouri-Illinois and 78% to the Frisco (R. 83). Another route is the route over which the traffic moved, namely, via the Frisco from Greig, Oklahoma, to St. Louis, Missouri, thence Missouri Pacific to Flinton, Illinois, thence Missouri-Illinois to Selmaville, Illinois. Via this latter route the Missouri Pacific would perform a service from St. Louis, Mo., to Flinton, Ill., which is about equal in miles to that from St. Louis, Mo., to Ste. Genevieve, Mo., of which the Frisco would be relieved (R. 89). It is perfectly obvious, therefore, that the Missouri-Illinois would want to protect its division of 22% of the revenue regardless of the route over which the traffic might move. It therefore insisted that Flinton, Illinois, as well as Kellogg, be added as a gateway and that the factors to and from Kellogg, Illinois, apply to and from Flinton (R. 83).

The service performed by the Missouri Pacific over the route of movement, being equal in miles to the service of which the Frisco would be relieved if the traffic had moved via Ste. Genevieve, it is reasonable that the Frisco should share its portion of revenue with the Missouri Pacific. The services performed by the Missouri-Illinois would be substantially the same over either route (R. 89).

The record shows, we submit, that the Missouri-Illinois Railroad Company became a party to the division sheet upon the understanding, adequately expressed, that revenue derived from traffic from the Southwest destined for points on its line and received at either Kellogg or Flinton should be divided 22% to it and 78% to the carrier or carriers which transported the shipments to either of those gateways.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

THOS. T. RAILEY,
GEO. W. HOLMES,
TOLL R. WARE,
Counsel for Petitioners.

Dated: February 4th, 1955.

STATUTES INVOLVED.

Interstate Commerce Act.

Section 1 (4), 54 Stat. 900; 49 U. S. C. A., Section 1 (4).

Sec. 1 (4). It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

Section 6 (1), 24 Stat. 380; 25 Stat. 855; 34 Stat. 586; 41 Stat. 483; 49 Stat. 543; 49 U. S. C. A., Section 6 (1).

Sec. 6 (1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established

rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part.

Section 8, 24 Stat. 382; 49 Stat. 543; 49 U. S. C. A., Section 8.

Sec. 8. That in case any common carrier subject to the provisions of this part shall do, cause to be done, or permit to be done any act, matter, or thing in this part prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this part required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this part, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Section 9, 24 Stat. 382; 49 Stat. 543, 49 U. S. C. A., Section 9.

Sec. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this part may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this part, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

Section 16 (3) (a), 43 Stat. 633; 49 Stat. 543; 54 Stat. 913; 49 U. S. C. A., Section 16 (3) (a).

Sec. 16. (3) (a) All actions at law by carriers subject to this part for recovery of their charges, or any part thereof, shall be begun within two years from the time the cause of action accrues, and not after.

Section 16 (3) (e), 43 Stat. 633; 49 U. S. C. A., Section 16 (3) (e).

Sec. 16. (3) (e) The cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after.

APPENDIX B.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 15,038.

Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor; and Missouri-Illinois Railroad Company, a corporation,
Appellants,

vs.

St. Louis-San Francisco Railway Company,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[December 23, 1954.]

Toll R. Ware (Thos. T. Railey and George W. Holmes were with him on the brief), for appellants.

John E. McCullough (James L. Homire, Alvin J. Baumann, and Ernest D. Grinnell, Jr., were with him on the brief), for appellee.

Before Sanborn, Woodrough and Johnsen, Circuit Judges.

Woodrough, Circuit Judge.

This appeal is taken to reverse the judgment rendered in favor of the plaintiff in the action St. Louis-San Francisco Railway Company against the defendant Missouri-Illinois Railroad Company[1] in the sum of $361,078.05 with interest and costs in accord with the findings of fact and conclusions of law drawn as directed by the district court in its opinion in the case reported at 117 F. Supp. 57.

As stated in that opinion, the suit was one "arising out of a dispute between the plaintiff and defendants over the division of revenue arising from the transportation of 7,131 tank cars of crude petroleum oil, transported from Greig, Oklahoma, to Selmaville, Illinois, during the period from June 1, 1944 to October 31, 1945. The parties plaintiff and defendants are railroads engaged in interstate commerce subject to the Interstate Commerce Act, and while all parties are Missouri corporations jurisdiction of this court is conferred by the Interstate Commerce Act, 49 U. S. C. A., sec. 1, et seq."

"The cars in question were routed via the St. Louis-San Francisco Railway Company (hereinafter referred to as Frisco), from Greig, Oklahoma, to St. Louis, Missouri, thence via Missouri-Pacific Railroad Company (hereinafter referred to as Missouri Pacific), to Flinton, Illinois, thence via Missouri-Illinois Railroad Company (hereinafter referred to as Missouri-Illinois), to Selmaville, Illinois, and so moved. This routing of the cars was over a through route to which a joint through rate was applicable. The division of the freight rates was made by the

[1] The Missouri Pacific, defendant below and co-appellant here, owns a majority of the voting stock of the Missouri-Illinois and has an option on the remainder.

Missouri-Illinois, the settling carrier, and 22% of the total revenue was allotted to the Missouri-Illinois, and 78% to the Frisco and Missouri Pacific, of which 78% the Frisco was allotted 65% and the Missouri Pacific 35%."

The plaintiff objected to the division as made, claiming that the total amount of $1,322,630.31 which was collected by application of the lawful joint tariff for the transportation from Greig, Oklahoma, a station of the Frisco in Southwestern Territory, to Selmaville, Illinois, a station on the Missouri-Illinois Railroad in Illinos Freight Association Territory moving through the St. Louis-East St. Louis Gateway and interchanged thereat, was lawfully required to be 78% to the carrier within the Southwestern Territory, namely, the plaintiff Frisco, and 22% to the defendant carriers within the Illinois Freight Association Territory, namely, the Missouri-Illinois and the Missouri Pacific.

The Frisco accordingly brought this action to recover the percentage which it claimed to be its lawful share and the Court having found that it had jurisdiction under the Interstate Commerce Act, declared that "the only question before the court is whether the Missouri-Illinois, the settling carrier, properly divided the revenue." The court stated, "It is undisputed that Southwestern Lines Division Sheet 100 and the supplements thereto in force and effect during the period in which the shipments were made governed the division of revenue. The Missouri-Illinois interpreted the Division Sheet and supplements thereto as providing that the gateway for division purposes was Flinton, Illinois, whereas the plaintiff contends that the gateway for division purposes was St. Louis, Missouri-East St. Louis, Illinois. The question for the court is the interpretation of the contracts between the parties, to wit, the Division Sheet and the supplements thereto, since they

form the basis for division of revenue. Division Sheet 100 when originally issued in 1931 did not apply to the Missouri-Illinois. As a result of the supplements to the Division Sheet after 1942, by agreement the Missouri-Illinois made the Division Sheet applicable to it. Under the Division Sheet as originally issued, St. Louis-East St. Louis was one of the divisional gateways, and when the Missouri-Illinois became a party to the Division Sheet, Kellogg, Illinois, was established as one of the divisional gateways, and thereafter Flinton, Illinois, was established as one of the divisional gateways. It is undisputed that in certain instances under the Division Sheet and the supplements thereto, St. Louis, Missouri-East St. Louis, Illinois; Kellogg, Illinois; and Flinton, Illinois, are divisional gateways. With respect to the shipments in question, the interchange at Flinton was intra rather than interterritorial, and under the principles and formula set up in Division Sheet 100 and supplements thereto, the gateway for division purposes on the freight in question would be at St. Louis, Missouri-East St. Louis, Illinois, unless there was a specific exception making Flinton the gateway. The supplements set forth a number of exceptions to the principles and formula of the Division Sheet, but the court is unable to find any exception with respect to the movement in question. The Division Sheet does not deal with each gateway individually, but assumes that certain principles will determine which gateway governs, unless specifically provided to the contrary. There is nothing in the supplements to the Division Sheet to indicate that St. Louis, Missouri-East St. Louis, Illinois, is not the division point, and absent such a specific provision, the broad plan and its established principles would lead us to the conclusion that St. Louis-East St. Louis was the gateway for division purposes for the shipments in question, since it was at that

point that there was an interchange between the two territories and between carriers. The plaintiff is therefore entitled to judgment with interest from the date of its demand."

In preparing the findings, conclusions and judgment, St. Louis, Missouri-East St. Louis, Illinois, was used as the gateway for the purpose of dividing the revenue rather than the station Flinton, Illinois, which had been used by the Missouri-Illinois. It is agreed that if the court had jurisdiction and if St. Louis instead of Flinton was the applicable gateway and if the suit was timely brought, the judgment was right.

(1). **As to the findings of fact.**

Appellants contend for reversal that the trial court erred in making findings of fact numbered 15, 16 and 17, which read as follows:

"15. The evidence sustains a principle—the Docket 15234 principle—that on all interterritorial traffic between Southwestern Territory and Western Trunk Line-Illinois Freight Association Territory the gateway on the boundary where the traffic passes from one territory to another is the governing gateway for interterritorial divisional purposes, not only when interchange occurs at that gateway but also when traffic passes through it without interchange, unless there is a specific provision in Division Sheet 100 (or its supplements) or an agreement to the contrary.

"16. There are no specific exceptions in Division Sheet 100, or any of its supplements, or any agreements which would nullify St. Louis-East St. Louis as the interterritorial divisional gateway on the traffic here in issue.

"17. St. Louis, Mo.-East St. Louis, Ill., is the interterritorial divisional gateway on the traffic here involved."

The position of appellants is that "the primary divisions in dispute break on Flinton, Illinois" and that such division is "specifically required by the provisions of Item 66 of Supplement 46 and applicable reissues thereof to Southwestern Lines Division Sheet 100."

In support of their position they stress that Missouri-Illinois was not a party to the proceedings before the Interstate Commerce Commission in Docket No. 15234 Division of Freight Rates (1928), 148 ICC 457; 156 ICC 94, and that the divisions as published in Southwestern Lines Division Sheet 100 were not prescribed divisions as to it. They argue that their divisions are not by compulsion of an interstate Commerce order but by voluntary agreement. They concede and assert as found by the trial court that the Interstate Commerce Commission in arriving at its cease and desist order in Docket 15234 adopted and enforced a principle referred to as the "15234 principle" to the effect that "the interterritorial divisional break should be made at the gateway at which the traffic passes from one territory to another" but they contend that the division here involved is not controlled by that principle. They contend that the following provisions of Item 66-B of Supplement 52 to Southwestern Lines Division Sheet 100 require that Flinton be taken as the gateway for division of the moneys in question:

"Special application to and from points of Missouri-Illinois Railroad.

"The basis of divisions published herein to and from points on the Missouri-Illinois are subject to application rules and regulations published in the Division Sheet as amended, except as follows:

"• • • • • • •

"(b) Between M-I RR stations in Illinois and the Southwest (section 2).

"(2) Factors to and from Kellogg, Ill., will also apply to or from Flinton, Ill." * * *

A witness for the defendants also presented assumed through freight movements and divisions thereon which it was contended illustrated and confirmed the defendants' claim that Flinton was the proper gateway for revenue division purposes herein.

On the other hand, the plaintiff contended in the trial court and repeats here that the findings 15, 16 and 17 are supported by substantial evidence. It agrees that Item 66 is the item of Division Sheet 100 which identifies the exceptions from the general provisions of the Division Sheet applicable to and from Illinois and Southwestern territory, paragraph (a) of that item being exceptions to the general application of the Sheet dealing with points on that railroad in Missouri and (b) being the exceptions dealing with the points in Missouri. But it contends that the words at the end of the opening paragraph "except as follows" are not meant to exclude all of the portions of the Division Sheet except those which follow in Item 66 itself. They are not intended to and do not constitute Flinton, Illinois, as the gateway for the traffic in question. On the contrary, they mean when considered in their context that if and when Flinton, Illinois, may by some appropriate provision of Division Sheet 100 or by agreement, be made the applicable gateway in a given case the factors to use in making the division will be the Kellogg, Illinois, factors. Admittedly, no such provision is made elsewhere in Division Sheet 100 or by separate agreement so far as the involved shipments are concerned, and it is insisted for appellee that as to such shipments that such a provision would be inconsistent with the application of the Division Sheet.

In that regard appellee points out that Flinton, Illinois, is not located on the boundary of two territories and the shipments did not there pass from one territory to another, but did so at St. Louis. Flinton could not, therefore, be taken as the gateway under Division Sheet 100 without some specific application in the Sheet or other agreement providing therefor. The testimony for the plaintiff tended to show that in all instances where departures from or exceptions to the Docket 15234 principle have been made in divisions on shipments which have passed from Southwestern to Illinois Freight Association Territory there is involved service performed by a Southwestern carrier to (or from) and through a named gateway without interchange with continuing service (by either the same line or by that line in conjunction with another line otherwise identified in the Sheet as a Western Trunk Line-Illinois Freight Association carrier) in Western Trunk Line-Illinois Freight Association Territory to (or from) another named gateway and there interchanged for service to (or from) a destination (or origin) in Western Trunk Line-Illinois Freight Association Territory.

On consideration of the evidence, we think that each of the findings, 15, 16 and 17, is supported by substantial evidence and none is clearly erroneous. We think that when Division Sheet 100 is considered in its entirety and effect is given to the principle established by the Interstate Commerce Commission in Docket 15234 in Compliance with which the Division Sheet 100 and Supplements are issued, it must be held that St. Louis-East St. Louis, through which the shipments here passed from one territory to the other and at which they were interchanged, was the proper territorial gateway to be used for division of revenue in this case. It clearly appears that the judgment of the District court is supported by past practice and also that it re-

sults in compensation to all parties reasonably related to the service. The evidence[2] is that Frisco carried each shipment 535.3 miles from Greig, Oklahoma, to St. Louis, Missouri; Missouri Pacific carried them 53.3 miles and Missouri-Illinois 75.4 miles, a total for the two of 128.7 miles. The judgment awarded the Frisco 78% and the other two roads 22%. The use of Flinton as the gateway resulted in 50.7% for transporting the shipment 80.6% of the total distance and 49.3% for transporting it 19.4% of the distance.

(2). **As to Jurisdiction.**

Appellants have earnestly insisted that there was no jurisdiction of this action in the federal District court. It was admitted that there was no diversity of citizenship and appellants argue that the action should be considered as simply an action for money due under a contract or for an accounting for moneys received for the use of the plaintiff. But we affirm the holding of the trial court that "jurisdiction of this court is conferred by the Interstate Commerce Act, 49 U. S. C. A., section 1 et seq."

The essential purpose of the action was to enforce a right of the plaintiff to have the defendants perform a duty prescribed by Section 1 (4) of the Act which provides:

"It shall be the duty of every common carrier subject to this part * * * in case of joint rates, fares or charges, to establish just, reasonable and equitable divisions thereof which shall not unduly prefer or prejudice any of such participating carriers."

The duty to "establish" the just divisions can not be construed as limited to merely signing writings concerning them. As used in the text, the duty to "establish just di-

[2] Taken from appellee's brief and not disputed.

visions" meant to originate, agree upon and apply such divisions in conducting the business to which the statutory regulation applies. As stated by the Supreme Court in **Alton Railroad v. United States**, 287 U. S. 229 (loc. cit. 235-6), "each carrier is entitled as of right to the divisions agreed upon," and the duty to make the division according to law derives directly from the Interstate Commerce Act.

Sections 8 and 9 of the Interstate Commerce Act provide authority to sue for any part of interstate freight divisions claimed to be wrongfully withheld from one carrier by another. The sections provide:

"That in case any common carrier subject to the provisions of this part * * * shall omit to do any act, matter, or thing in this part required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this part * * * (49 U. S. C. A., Sec. 8).

"That any person or persons claiming to be damaged by any common carrier subject to the provisions of this part may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this part, in any District or Circuit Court of the United States of competent juirsdiction; * * * (49 U. S. C. A., Sec. 9)."

The federal courts have long exercised jurisdiction of suits brought to enforce duties imposed upon carriers by the Interstate Commerce Act. **In Re Lennon**, 166 U. S. 548, 553; **Produce Realty Corporation v. N. Y., N. H. & H. Railroad Co.**, 116 F. Supp. 451.

In addition to Sections 8 and 9 of the Interstate Commerce Act, the jurisdiction is plainly conferred by Section

1337 of the Judicial Code, 28 U. S. C. A., Section 1337, which provides:

"The District Courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce * * *."

In development of the regulation of the nation's railroads the regulation of the rates charged by the individual roads in interstate commerce was followed by regulation of the joint rates and a vital element of the regulation of joint rates was regulation of the division of them among the carriers jointly engaged in the interstate haul. The defining of territories and establishment of gateways and their use for purposes of such divisions was a necessary incident. Where, as in this case, the complaint is that a carrier subject to the Act has denied the plaintiff the share of joint revenue due it by reason of a controlling principle established by the Interstate Commerce Commission, the action arises under the Act regulating Commerce, within the intendment of Section 1337.

49 U. S. C. A. preceding Section 1, reads:

"It is hereby declared to be the National Transportation Policy of the Congress * * * to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages or unfair or destructive competitive practices; * * * All provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

As the fixing of gateways to be used for division of joint revenues is a fundamental part of the function of division of joint transportation receipts the dispute as to the point to be used for the purpose of division here presents a federal question. The intent of Congress is to accomplish uni-

form regulation and it is necessary that there be a single authority to settle the division of the proceeds of joint traffic which passes over more than one state. Although the Division Sheets "issued in compliance with Interstate Commerce Commission Opinion and Order" are not strictly tariff sheets or published as such, substantially the same grounds of federal jurisdiction are present in respect to a suit to recover a part of a division for interstate transportation under the Division Sheets as over a suit to recover sums due from a shipper under a published tariff. We find no error in the ruling that the court had jurisdiction.

(3). **As to the Statute of Limitations.**

Appellants contend that plaintiff's cause of action was barred by the statute of limitations of Sections 16(3)(a) and 16(3)(c) of the Interstate Commerce Act in that the suit was not begun within two years after the cause of action accrued. As shown by stipulation, the transportations here involved occurred during the period June 1, 1944 to October 31, 1945, and formal demand for payment was made upon the defendant Missouri-Illinois Railroad Company in accordance with the applicable accounting rules of the carriers on August 25, 1947. The suit was brought January 29, 1952.

Sections 16(3)(a) and 3(c) read as follows:

"16(3)(a). All actions at law by carriers subject to this part for recovery of their charges, or any part thereof, shall be begun within two years from the time the cause of action accrues, and not after."

"16(3)(c). The cause of action in respect of a shipment of property shall for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after."

Appellants' contention is that the lapse of time before commencement of the action "destroyed the liability". Their reliance is upon **Midstate Co. v. Penn R. Co.**, 320 U. S. 356.

But the precise question was considered by the court in **Atlantic Coast L. R. Co. v. Baltimore & Ohio R. Co.**, 12 F. Supp. 711 (loc. cit. 718-719), and we are in accord with the court's declaration in that case that "these provisions [49 U. S. C. A., section 16(3)(a-c)] seem to contemplate actions or complaints between carriers and shippers, and not between carriers only. (a) and (c) also seem clearly inapplicable because the complaint here is not for the recovery of 'charges' or 'over charges.'" That decision appears to have been accepted by the railroads since its promulgation in 1935 without any protest that we know of by the Interstate Commerce Commission which is primarily charged with the railroad regulation involved in divisions from interterritorial hauls. And we adhere to it.

We find no error in the judgment appealed from and affirm it at appellants' costs.

Johnsen, Circuit Judge, concurring.

I have been unable to persuade myself that there was not a sufficient basis, on the entire documentary situation, facially and contextually, for the trial court to hold, as it did, that in the correlation of Item 66-B with Division Sheet 100, under the recognized control of the Division Sheet by the Docket 15234 principle, the language of paragraph (b) (2) of Item 66-B was not sufficient, in specificness, unambiguity and lack of other possible meaning, to require that it be accorded the legal effect of, and accepted

as a standard for, limiting or nullifying in the situation the application of the interterritorial primary-division breaking-point rule. I accordingly concur in this part of Judge Woodrough's opinion.

The only portion of the opinion that has bothered me somewhat is the construction made of 49 U. S. C. A. § 16(3) (a) and (e), through the adoption of Judge Chestnut's language in **Atlantic Coast Line R. Co. v. Baltimore & O. R. Co.**, D. C. Md., 12 F. Supp. 711, 718, that "These provisions seem to contemplate actions or complaints between carriers and shippers, and not between carriers only." I can see no reason on the statute to believe that, when Congress deemed it advisable, in the interest of uniformity and certainty, to impose a limitation on "All actions at law by carriers * * * for recovery of their charges, or any part thereof", it was in any way concerned about or intending to have regard for any theories, forms, technicalities and distinctions in common law actions or recoveries. I think it was fixing a time, as a general transportation-code policy, within which a carrier had to act to recover its transportation charges or revenues against anyone who owed it the duty of making payment thereof as such. And certainly what is here being recovered is in fact transportation charges or revenues.

Both of my colleagues, however, feel that Judge Chestnut's construction of the statute has probably had such acceptance and reliance in the railroad world as to be entitled to stand on the basis of stare decisis. I am without any enlightenment or data in the situation on this score, either from the briefs or otherwise, but I shall, for the sake of unanimity, go along and accept my colleagues' respected view on the point.

Sanborn, Circuit Judge, dissenting.

I have been unable to discover any satisfactory reason for deciding that the division of the freight revenue in suit based on Flinton, Illinois, was unlawful. I agree that if the applicable supplement to Division Sheet 100 adding Flinton as a gateway for traffic from the Southwest to points on the Missouri-Illinois Railroad Company is ambiguous with respect to the division of revenues on such traffic, the conclusion of the District Court should not be overturned. But the fact that the division of revenue of which the appellee complains is unfair to it would not, in the absence of ambiguity, justify a court in amending the applicable Division Sheet as supplemented.

It seems to me that the record shows that the Missouri-Illinois Railroad Company became a party to the Division Sheet in suit upon the understanding, adequately expressed, that revenues derived from traffic from the Southwest destined for points on its line and received at either Kellogg or Flinton should be divided 22% to it and 78% to the carrier or carriers which transported the shipments to either of those gateways. Apparently, Kellogg and Flinton were the only points through which traffic from the Southwest could move to points on the Missouri-Illinois Railroad. The expert witnesses who testified seem to have been in substantial accord with respect to the proposition that if it had been intended to exclude Flinton as a basing point for the division of revenue on shipments such as those in suit, there should have been an exception in paragraph (b) of Item 66-B of the applicable supplement to the effect that divisions via Kellogg or Flinton would not apply on traffic from the Southwest interchanged at East St. Louis, Illinois, or St. Louis, Missouri.

I agree that the District Court had jurisdiction of this action, and that the claim of the appellee was not barred or extinguished by limitations. I am, however, of the opinion that there was an inadequate basis for determining that the Missouri-Illinois Railroad Company's division of the joint revenue on the traffic in suit was unlawful. The judgment appealed from should, I think for that reason only, be reversed.

A true copy.

Attest:

E. E. Koch,
Clerk, U. S. Court of Appeals, Eighth Circuit.

(Seal)